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No. 00-1692

In the Supreme Court of the United States

WETLANDS ACTION NETWORK, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to examine the environmental impacts of proposed federal actions. Regulations promulgated by the United States Army Corps of Engineers (Corps) specify the appropriate scope of NEPA analysis when the proposed federal action, such as obtaining a permit to fill federally delineated wetlands, is merely one component of a larger project that is not otherwise within the Corps' regulatory jurisdiction. Under those regulations, the scope of the NEPA analysis of a proposed federal action depends upon an examination of a number of factors, including the "extent of cumulative Federal control and responsibility" over the entire project. 33 C.F.R. Pt. 325, App. B § 7(b)(iv). The question presented is as follows:

Whether the Corps abused its discretion when it determined that its NEPA analysis of a permit authorizing the fill of 16 acres of wetlands should be based on the direct, indirect, and cumulative impacts of that federal action, rather than on the impacts of the entire project of which the federal action was only a small part.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 222 F.3d 1105. The opinion of the district court (Pet. App. 39a-92a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2000. A petition for rehearing was denied on January 10, 2001 (Pet. App. 38a). On March 30, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including May 10, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to a permit issued by the United States Army Corps of Engineers (Corps) to Maguire Thomas Partners-Playa Vista (MTP-PV). The permit authorizes MTP-PV to fill 16.1 acres of scattered, highly degraded wetlands, and to create a 51-acre freshwater wetland system to mitigate that fill. That federal action is a component of a much larger project—MTP-PV's construction of a multi-phase, mixed-use development on a 1000-acre property owned by MTP-PV. Following extensive consideration, the Corps determined that an environmental impact statement for the challenged permit was not required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the Corps' regulations. The court of appeals upheld that determination as a proper exercise of discretion.

1. NEPA requires federal agencies to examine the environmental effects of proposed federal actions, and to inform the public of the environmental concerns that were considered in the agency's decisionmaking. *Baltimore Gas & Elec. Co.* v. *Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). Among other things, NEPA requires agencies to prepare an environmental impact statement (EIS) for any proposal involving a "major *Federal action[]* significantly affecting the quality of the human environment," and establishes the requirements of an EIS. 42 U.S.C. 4332(2)(C) (emphasis added). "NEPA does not, however, expand the range of final decisions an agency is authorized to make," and "does not expand an agency's substantive powers." *Natural Res. Def. Council, Inc.* v. *EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988) (citing additional cases).

Accordingly, NEPA does not permit agencies to expand their regulatory jurisdiction.

The Council on Environmental Quality (CEQ) has promulgated regulations providing that an agency may prepare an environmental assessment (EA) to determine whether a proposed action is likely to have a significant impact on the environment. 40 C.F.R. 1501.3, 1501.4. The regulations define "major Federal action" to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. 1508.18. If an agency finds that a proposed action will not have a significant effect on the quality of the human environment, no EIS is required. 40 C.F.R. 1501.4(b), 1508.13. A reviewing court may not substitute its judgment for that of the agency as to the environmental consequences of a challenged federal action. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978). Instead, the agency's determination whether to proceed with an EIS must be upheld unless it is arbitrary and capricious. *Id.* at 554-555; Pet. App. 16a-17a.

The Corps has its own regulations implementing NEPA, which were approved by CEQ. 33 C.F.R. Pt. 325, App. B § 7(b). In particular, the regulations provide that, when the activity requiring a permit is "merely one component of a larger project," the EA or EIS should "address the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has *sufficient control and responsibility* to warrant Federal

review." *Ibid.* (emphasis added).[1]

In determining whether the degree of federal "control and responsibility" over a project is sufficient to require consideration of the environmental impacts of the entire project, and not just the activity requiring a permit, the regulations direct the Corps to consider the following factors:

> (i) Whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project).
>
> (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

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[1] 33 C.F.R. Part 325, Appendix B § 7(b) provides:

> *Scope of Analysis.* (1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.
>
> (2) The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.

> (iii) The extent to which the entire project will be within Corps jurisdiction.
>
> (iv) The extent of cumulative Federal control and responsibility.

33 C.F.R. Pt. 325, App. B § 7(b)(2).

The Corps' regulations include examples of the proper scope of NEPA analysis in various situations. 33 C.F.R. Pt. 325, App. B § 7(b)(3). For instance, the regulations state:

> If a non-Federal * * * industrial facility is proposed to be built on an upland site and the only DA permit requirement relates to a connecting pipeline, supply loading terminal or fill road, that pipeline, terminal or fill road permit, in and of itself, normally would not constitute sufficient overall Federal involvement with the project to justify expanding the scope of a Corps NEPA document to cover upland portions of the facility beyond the structures in the immediate vicinity of the regulated activity that would effect the location and configuration of the regulated activity.

Ibid. Similarly, in the case of a 50-mile electric transmission cable crossing a one and one-quarter mile-wide river that is a navigable water of the United States, the EA would require the agency to address the impacts of the specific cable crossing, and not the "origin and destination of the cable nor its route to and from the navigable water, except as the route applies to the location and configuration of the crossing," because those features of the project are not "within the control or responsibility of the Corps." *Ibid.*

The Ninth Circuit has upheld the Corps' regulations as "strik[ing] an acceptable balance between the needs

of NEPA and the Corps' jurisdictional limitations." *Sylvester* v. *Army Corps of Eng'rs*, 884 F.2d 394, 399 (9th Cir. 1989). And petitioners have not challenged those regulations in this case.

2. a. This case involves a 1000-acre parcel of property known as Playa Vista, which is located in Los Angeles, California, and contains 186 acres of federally delineated wetlands. Pet. App. 5a-6a. For more than two decades, MTP-PV has been planning to build a large-scale, mixed-use development on that property, combining housing, offices, retail stores, hotels, recreation areas, and open space in a design intended to reduce dependence on automobiles. *Ibid.* The proposed development has been the subject of close scrutiny by federal, state, and local regulators, as well as extensive environmental planning and permitting proceedings. *Id.* at 6a & n.4; Gov't C.A. Br. 8.

MTP-PV proposed to divide the overall project into three separate phases. Phase I of the project involves the development of approximately five million square feet of office space, 13,000 residential units, and retail and hotel space. Pet. App. 8a n.6. A small part of Phase I calls for the filling of 16.1 acres of federally delineated wetlands, and the creation of a 51.1-acre freshwater wetland system to mitigate the impacts of the project and provide stormwater management. The wetlands subject to Phase I have been substantially degraded from years of heavy industrial and agricultural use. Eight acres of the wetlands subject to Phase I are located on 17 isolated patches of land scattered across the Playa Vista property; the remaining eight acres will be used to create the freshwater wetland system (for which four of those acres will be restored to wetlands). *Id.* at 6a-7a, 8a. Phase II of the project provides for the restoration and expansion of a remnant salt marsh,

from approximately 160 to 230 acres. Phase III—which recently was combined with the proposed second phase—calls for the development of a marina and associated commercial and residential space. *Id.* at 7a.

The project was divided into those three phases for purposes of permitting. The permit at issue in this case governs only the filling of the 16.1 acres of wetlands in connection with the first phase of the project. At the time of the lower court proceedings in this case, MTP-PV had not submitted a permit application for either the second or the third phases of the project. The Corps has determined, however, that an EIS will be required in connection with the permit applications for those phases (which, as noted, have since been merged into one). 60 Fed. Reg. 20,975 (1995).

b. In August 1990, MTP-PV applied to the Corps pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 1344, for a permit to fill the Phase I wetlands. After MTP-PV submitted an analysis of proposed alternatives to filling the wetlands, the Corps publicly announced its preliminary determination that an EIS would not be required for the proposed action, and invited public comment. Numerous members of the interested public, environmental groups, and pertinent state and federal resource agencies commented on a variety of issues in connection with MTP-PV's permit application, including the Corps' compliance with NEPA. Pet. App. 8a-9a.

In particular, the National Marine Fisheries Service (NMFS), the United States Fish and Wildlife Service (FWS), and the United States Environmental Protection Agency (EPA) (collectively, the "resource agencies") submitted comments raising certain concerns about the permit application and project in general. NMFS expressed concern about the decision to evalu-

ate the Playa Vista project in three separate phases and permit applications, and recommended that the Corps reconsider its preliminary determination that an EIS was not necessary. The FWS suggested in conclusory fashion that an EIS was warranted. EPA did not question the Corps' preliminary determination that an EIS was not required. Petitioners did not submit any comments. Pet. App. 9a.

In 1991, MTP-PV submitted to the Corps a response to the public comments, along with additional scientific studies on the proposed development. MTP-PV explained that an EIS was neither necessary nor appropriate because the three project phases had independent utility, were at different stages of planning, and were subject to different governmental jurisdictions. MTP-PV further explained that the wetlands fill constituted only a small portion of Phase I. Of the 5,025,000 square feet of office space, the 13,085 dwelling units, and the retail and hotel space in the proposed Phase I project, only 80,000 square feet of office space (less than 1.6 %), only 450 dwelling units (3.4 %), and none of the hotel and retail space would be built on federally delineated wetlands. Given the limited scope of the permitted action—especially relative to the entire project—MTP-PV asserted that the federal action for purposes of NEPA should not include the upland impacts of the Playa Vista project, and thereby bring the entire project within federal jurisdiction. Pet. App. 8a n.6, 9a-10a; see 5 Admin. Record (AR) 2118-2127.

In February 1992, the Corps completed initial drafts of the permit and EA, and notified the resource agencies that it intended to issue the permit approving the filling of 16.1 acres of wetlands as part of Phase I. After various meetings and exchanges of information

between the Corps, MTP-PV, and the resource agencies, the Corps issued a second notice of intent to issue the permit with new permit conditions, and the resource agencies dropped their objections to the permit. In July 1992, the Corps issued the permit (including the agreed-upon conditions), along with the associated EA and finding of no significant impact (or FONSI). Pet. App. 10a-11a; Gov't C.A. Br. 8-13 (discussing permitting process with federal and other authorities).

c. The EA contained a discussion of the comments received by the Corps and the numerous factors considered by the Corps in deciding whether to approve the permit, including possible alternatives to the Playa Vista project; the impacts of the project on water supplies, aesthetics, traffic and transportation patterns, energy consumption, and air quality; and other factors. The EA further discussed secondary and cumulative effects of the entire project on the surrounding area. Gov't C.A. Br. 14. The Corps determined, however, that "it did not need to include substantial consideration of the development in the uplands area as part of the NEPA review of [the] permit application because it found that such development was outside its jurisdiction." Pet. App. 11a.

The EA explained that MTP-PV's three-phase approach to the Playa Vista project was appropriate because of the independent utility of the project phases and the large size and multi-faceted nature of the project. In addition, the Corps explained that implementation of the entire project would be staged over several years and would depend on changing market conditions, diverse zoning controls, and permit authorizations required by various local government agencies. The Corps found that division of the project for permit

application purposes would help ensure that the application would not be so large as to obscure its individual components, and would not include future components that were still in the early planning stages and therefore not susceptible to meaningful consideration and comment. Gov't C.A. Br. 14-15.

The EA further determined that the proposed action would actually result in a net *increase* in wetland values, because, under the permit, 16.1 acres of highly degraded wetlands would be replaced with 51 acres of higher-value riparian and wetland habitat. The EA also found that, even if the Corps denied the permit, the development of the uplands would likely go forward, resulting in the isolation and destruction of the wetlands while increasing the traffic-related impacts from the project. The Corps concluded that the proposed permit action does not have sufficient impacts to warrant an EIS. Pet. App. 11a-12a; Gov't C.A. Br. 14.

d. After the permit was issued, "MTP-PV performed extensive filling, clearing, and grading in the wetlands in the permit area." Pet. App. 12a. Many of the wetlands covered by the permit have already been filled. Gov't C.A. Br. 15.

3. In December 1996, more than four years after the permit was issued and after substantial filling had taken place, petitioners filed this action, alleging that the Corps' issuance of the Phase I permit violated NEPA.[2] Petitioners sought revocation of the permit and a preliminary and permanent injunction enjoining construction activity on the site. The district court denied the request for a preliminary injunction. In June

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[2] Petitioners raised several additional claims under NEPA and the Clean Water Act. But petitioners subsequently abandoned those claims and they are not implicated here.

1998, however, the court granted summary judgment for petitioners. In particular, the court found that the Corps had violated NEPA by improperly limiting the scope of its analysis to the impacts of the activities covered by the permit rather than considering impacts from the upland development. The district court invalidated the permit and enjoined MTP-PV from any further construction activities in the area covered by the permit, but it denied petitioners' request for an injunction against further construction on the upland portions of the site. The parties filed cross-appeals. Pet. App. 12a-13a.

4. The court of appeals reversed the district court's decision to invalidate the permit and remanded with instructions to vacate the injunction. Pet. App. 1a-35a. The court explained at the outset that "[t]he Corps' decision to prepare an EA rather than an EIS is reviewed under the APA's arbitrary and capricious standard." *Id.* at 16a. Because the Corps' decision to grant the permit was consistent with both the Corps' regulations—which petitioners did not challenge—and the record, the court held that "[t]he Corps' determination of the scope of the NEPA review and its issuance of a FONSI was not arbitrary and capricious." *Id.* at 35a.

The court of appeals explained that, under the Corps' NEPA regulations, "where the activity requiring a * * * permit is 'merely one component of a larger project,'" the scope of the Corps' NEPA analysis depends upon a multi-factored determination whether federal "control and responsibility" exists over the portions of the project not subject to the permit. Pet. App. 17a (quoting 33 C.F.R. Pt. 325, App. B § 7(b)); see *id.* at 17a-19a. The court then concluded that the record supports the Corps' determination that the Phase I

permit is functionally independent of the rest of the project, and that the Corps "does not have independent jurisdiction over the parts of the Phase I development that do not require the filling of wetlands." *Id.* at 22a. Indeed, "Phase I encompasses development of approximately 600 acres, only 16 of which are subject to direct control by the corps through the permitting process"; "the project is not financed by federal money"; and "state and local, not federal, regulations control the overall design" of the project. *Ibid.*

The court of appeals explained that the district court's contrary approach would greatly expand federal jurisdiction over private development projects and enlarge the Corps' obligation to review the environmental impacts of such projects in a manner that is contradicted by the Corps' regulations:

> The linkage that the district court found between the permitted activity and the specific project planned is the type of "interdependence" that is found in any situation where a developer seeks to fill a wetland as part of a large development project. If this type of connection alone were sufficient to require a finding that an entire project falls within the purview of the Corps' jurisdiction, the Corps would have jurisdiction over all such projects including those which the Corps' regulations cite as examples of situations in which the Corps would not have jurisdiction over the whole project.

Pet. App. 21a (citing 33 C.F.R. Pt. 325, App. B § 7(b)(3)).

The court of appeals also rejected the contention that the potential environmental impacts of Phases II and III of the Playa Vista project must be considered together with the potential impacts of the permit

pertaining to Phase I in a single NEPA analysis. Pet. App. 24a-27a. Again, the court emphasized that courts owe "considerable discretion" to an agency's determination whether multiple actions are sufficiently connected to require that they be examined as part of a single EA under the CEQ regulations. *Id.* at 24a. Moreover, the court found that "[t]he record supports the Corps' conclusion" that each of the three phases has "independent utility," and they therefore are not "connected actions" for purposes of the CEQ regulations, *id.* at 24a-25a, and that the three phases are not "cumulative" actions under either the CEQ regulations or Ninth Circuit precedent. *Id.* at 26a.

ARGUMENT

The court of appeals unanimously and correctly determined that the Corps did not abuse its discretion in assessing the environmental impacts of the challenged permit based on the direct, indirect, and cumulative impacts of that permit, and not those of the entire Playa Vista project at large. That determination is supported by the extensive record in this case and squares with the scope of NEPA review called for by the Corps' regulations, which petitioners have not challenged. The court of appeals' fact-bound decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The scope of the NEPA analysis undertaken by the Corps comports with the requirements of NEPA and its implementing regulations. As discussed above, NEPA requires an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The CEQ's NEPA regulations define "major Federal action" to include "actions

with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. 1508.18. Similarly, the Corps' regulations—which were reviewed and approved by CEQ—provide that where the activity requiring a permit is "merely one component of a larger project," the EA should "address the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. Pt. 325, App. B § 7(b).

Petitioners have not challenged the Corps' NEPA regulations and, as the court of appeals concluded, the record in this case supports the Corps' determination that, among other considerations, the lack of federal control and responsibility over the entire Playa Vista project justified the Corps' decision to limit its EA to the particular federal action at issue—*i.e.*, the permit allowing the fill of 16.1 acres of wetlands in connection with Phase I of the project. As the court explained, "Phase I encompasses development of approximately 600 acres, only 16 of which are subject to direct control by the corps through the permitting process." Pet. App. 22a. At the same time, the Playa Vista project is not dependent on the permit at issue (and in fact proceeded without it), the project "is not financed by federal money," and "state and local, not federal, regulations control the overall design" of the project. *Ibid.*

The Corps' regulations give two examples of situations in which the action requiring a Corps' permit (*e.g.*, building a dock or running a pipeline or power line across a river) is part of a larger project to be constructed on uplands. 33 C.F.R. Pt. 325, App. B § 7(b)(3). Although the permit activity in those examples would

not be justified in the absence of the rest of the project, the regulations provide that the upland portions of those projects should *not* be deemed to be within the control and responsibility of the Corps for purposes of establishing the scope of NEPA review. The record in this case supports the same conclusion. Indeed, as the court of appeals explained, if the type of connection relied upon by petitioners (and the district court) to establish federal control and responsibility over the entire Playa Vista project—a permit to fill 16 acres of wetlands as part of a much larger project—were sufficient to bring the project within the Corps' purview for purposes of NEPA, "the Corps would have jurisdiction over all such projects including those which the Corps' regulations cite as examples of situations in which the Corps would not have jurisdiction over the whole project." Pet. App. 21a.

More fundamentally, as discussed above, the Corps' determination that its EA should not extend beyond the federal activity that is the subject of the Corps' permit is entitled to substantial deference and is reviewable only for abuse of discretion. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978); Pet. App. 16a-17a. Even if it were possible to second-guess the Corps' determination on the extensive record in this case, the court of appeals correctly determined that "the Corps' decision to limit its review to the specific activity requiring the permit is not arbitrary or capricious." Pet. App. 23a. That fact-bound conclusion does not warrant further review.[3]

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[3] Although the Corps determined that "it did not need to include *substantial* consideration of the development in the uplands area as part of the NEPA review of [the] permit application," Pet.

2. Petitioners contend (Pet. 22) that the court of appeals' decision conflicts with *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989), arguing that *Robertson* "recognize[s]" that an agency "is required to look at impacts outside its regulatory jurisdiction when preparing an EIS," and therefore establishes that an agency is required to look at impacts "outside this jurisdiction when determining whether to prepare an EIS at all." That contention is without merit.

Robertson involved the question whether NEPA requires agencies to include in an EIS a fully developed plan to mitigate environmental harm, or "worst case" analysis of potential harm. 490 U.S. at 335-336. There was no question that the underlying federal action in that case—the Forest Service's issuance of a special-use permit for the operation of a 3900-acre ski resort on federal lands, *id.* at 338—was a major federal action requiring an EIS under NEPA. As a result, *Robertson* did not (and could not) decide how an agency should define the scope of the federal action for purposes of determining whether an EIS is required at all. With respect to that issue (*i.e.*, the one presented here), the Corps' regulations make clear that the Corps has no obligation to define its action to include non-federal actions—such as the construction of the upland portions

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App. 11a (emphasis added), the Corps' EA nonetheless discussed the environmental impacts of the project on water supplies, aesthetics, traffic and transportation patterns, energy consumption, and air quality, and other factors, as well as the secondary and cumulative effects of the entire project on the surrounding area. Gov't C.A. Br. 14. In addition, those portions of the project that do not fall within federal jurisdiction remain subject to state and local environmental controls, and have been and will be subjected to regulatory scrutiny.

of the development in this case—over which the Corps lacks "sufficient control and responsibility." 33 C.F.R. Pt. 325, App. B § 7(b). As discussed, petitioners do not challenge those regulations and *Robertson* itself underscores that an agency's interpretation of its own NEPA regulations is entitled to considerable deference. 490 U.S. at 358-359.

Furthermore, nothing in the court of appeals' decision (or the Corps' determination in this case) is inconsistent with the principle that an agency may be obliged to consider potential impacts that are beyond its jurisdiction in deciding whether to prepare an EIS. Indeed, the Corps' regulations (33 C.F.R. Pt. 325, App. B § 7(b)) require the Corps to consider the direct, indirect, and cumulative impacts—including extra-jurisdictional impacts—that would result *from its proposed action*: here, the issuance of the permit to fill 16 acres of degraded wetlands and creation of a 51-acre wetland system as mitigation. As the court of appeals concluded, the Corps satisfied those requirements in this case, in accordance with the approach established by its own regulations. Pet. App. 20a-23a. At the same time, however, the Corps is not obligated by NEPA or its implementing regulations to define challenged federal actions to include the actions of private parties that are otherwise beyond federal control and responsibility, and nothing in *Robertson* is to the contrary.

3. Petitioners allege (Pet. 22-25) that the court of appeals' decision also conflicts with the decisions of other circuits. That contention is similarly unavailing.

There is no conflict with *Sierra Club* v. *Marsh*, 769 F.2d 868 (1st Cir. 1985). That case was decided three years before the Corps' adopted the NEPA regulations utilized by it in determining the appropriate scope of the EA challenged in this case. See 53 Fed. Reg. 3120,

3121 (1988); 52 Fed. Reg. 22,518 (1987). In addition, *Marsh* is factually inapposite. There, the Corps and the Federal Highway Administration had approved construction of a causeway to, and a deep-water port on, a previously-undeveloped island in Penobscot Bay, Maine. The issue was whether the federal agencies were obliged to consider, as an indirect impact of their actions, the industrial development that would result from the causeway and port. The First Circuit answered that question in the affirmative, in part because those impacts would be caused by the federal actions. See 769 F.2d at 878 ("[T]he record makes it nearly impossible to doubt that building the causeway and port *will lead to* further development" on the island.) (emphasis added). In this case, by contrast, the court of appeals recognized that the upland impacts of the Playa Vista project could occur—and indeed, were occurring —even without the permit. Pet. App. 22a.

Nor does the decision below conflict with *Sierra Club* v. *Forest Service*, 46 F.3d 835 (8th Cir. 1995). That case involved a challenge to the Forest Service's finding that certain timber sales in a National Forest would have no significant environmental impacts, and turned in relevant part on whether the Forest Service's analysis of "connected" or "cumulative" actions was adequate. *Id.* at 837-838. The Eighth Circuit, following the Ninth Circuit's analysis in an earlier Forest Service case, held that the pertinent CEQ regulations (40 C.F.R. 1508.7, 1508.25) required the Forest Service to consider the impacts that anticipated future activities on adjacent private lands would have on the National Forest lands. 46 F.3d at 839 (citing *Resources Ltd.* v. *Robertson*, 35 F.3d 1300 (9th Cir. 1993)).

Petitioners argue (Pet. 24) that *Sierra Club* "clearly held that analysis of activities outside the jurisdiction of

the federal agency must be considered in determining whether to prepare an EIS." Petitioners, however, again confuse an agency's duty to analyze the potential impacts of the proposed *federal* action (even when those impacts would be beyond the Corps' jurisdiction) with an agency's obligation to include within the definition of federal action the actions of third parties that are beyond its jurisdiction. As explained above, under the Corps' regulations, the latter determination depends upon the degree of federal control and responsibility over the project at large. Petitioners suggest (Pet. 24) that the court of appeals' approval of the Corps' analysis of connected and cumulative actions was based on jurisdictional considerations. That is not so. The court's finding that the different project phases were not sufficiently connected to require a global EIS for the project was based on the pertinent CEQ regulations, the long-standing "independent utility" test, and Ninth Circuit case law, as applied to the extensive record compiled by the Corps. See Pet. App. 25a-27a.[4]

Society Hill Towers Owners' Ass'n v. *Rendell*, 210 F.3d 168 (3d Cir. 2000), is also distinguishable. The plaintiffs in that case argued that the Department of Housing and Urban Development (HUD) had failed to

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[4] Moreover, as discussed above, the court of appeals found that the record supported the Corps' conclusion that "the three phases of the project are not connected actions because each [has] independent utility." As a result, the Corps "was not required to consider the environmental impacts attributable to the three different phases in a single NEPA analysis." Pet. App. 25a. Similarly, the court found that Phases II and III need not be analyzed together with Phase I as "cumulative" actions, in part because the details and planning decisions regarding Phases II and III had not yet been completed when MTP-PV submitted its permit application. *Id.* at 26a-27a. See Gov't C.A. Br. 24-30.

consider the cumulative impacts of its approval of a grant funding development of a hotel and parking garage. *Id.* at 172, 180. Petitioners argue (Pet. 25) that *Society Hill* stands for the proposition that "impacts outside HUD's control must be considered under NEPA, even if they are not within HUD's jurisdiction, if they are virtually certain to be completed as in the present case." Even that characterization, however, does not conflict with the court of appeals' decision here. As explained above, the court of appeals' approval of the Corps' analysis of connected and cumulative actions was not based on jurisdictional considerations, but rather on its determination that the separate phases of the Playa Vista project were functionally independent. Pet. App. 24a, 26a-27a. In addition, whereas the cumulative impacts of the project in *Society Hill* were "virtually certain," the opposite was true here. As the court of appeals explained, at the time MTP-PV applied for the Phase I permit at issue, uncertainty clouded Phases II and III of the Playa Vista project, including whether those phases would receive approval from relevant federal, state, and local regulatory bodies. *Id.* at 27a.

Vieux Carre Property Owners v. *Pierce*, 719 F.2d 1272 (5th Cir. 1983), likewise does not conflict with the decision in this case. That case involves a straightforward application of the "independent utility" test and, if anything, underscores that the court of appeals' decision in this case is in step with the case law in other courts of appeals. As the Fifth Circuit explained:

> *Confronted with a project that had independent utility, the City properly determined that it should be assessed independently of future speculative phases.* Not only was the decision imminently [sic]

> reasonable under the facts before the City, it was entirely consistent with this Court's holdings that "NEPA does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1015 (5th Cir. 1980), *quoting Kleppe v. Sierra Club*, 427 U.S. 390, 96 S. Ct. 2718, 2730 n.20, 49 L.E.2d 576 (1976). As was the situation in *Environmental Defense Fund v. Marsh*, 651 F.2d 983 (5th Cir. 1981), "*we are here dealing with two projects that are historically distinct, one of which is proposed and the other still in the process of study and design. In that situation, NEPA does not yet require the [agency] to evaluate the environmental impact of the [second project].*" *Id.* at 999.

Id. at 1278 (emphasis added).

There is, in short, no conflict of authority in the lower courts on the narrow question presented, and this Court's review accordingly is not warranted.

4. Petitioners argue (Pet. 25) that the court of appeals' decision conflicts with the CEQ regulations. That is incorrect. The court of appeals specifically acknowledged and applied the pertinent CEQ regulations. Pet. App. 24a-25a. Petitioners' claim of a conflict with those regulations boils down to a disagreement with the court of appeals' application of the regulations to the record in this case. Petitioners' assertions (Pet. 27) regarding the importance of this case mischaracterize the court of appeals' decision. That decision breaks no new legal ground. The court of appeals correctly applied NEPA and its implementing regulations to the particular facts of this case, and concluded that the

Corps did not abuse its discretion in determining that the EA should be based on the federal permit action, and not the entire project of which that federal action was only a small and inessential part. That fact-bound determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[*] The Solicitor General is recused from participation in this case.